



## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Chapter I

[Docket No. FAA–2022–1203]

### Draft FAA Policy Regarding Processing Land Use Changes on Federally Acquired or Federally Conveyed Airport Land

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Proposed Policy; Request for Comments.

**SUMMARY:** This notice is directed to airport sponsors, consultants, and other stakeholders regarding a proposed update of the FAA policy and practice regarding processing land use changes on federally acquired or federally conveyed airport land. The updated policy confirms and clarifies the appropriate methods to document FAA’s review and approval or consent for such changes, in light of amendments made by Section 163 of the FAA Reauthorization Act of 2018. This policy clarifies: When reviewing proposed land use changes on federally acquired or federally conveyed airport land, the FAA will review the proposal in its entirety without individually examining components of the proposal as aeronautical or non-aeronautical; a letter of approval or consent is required for a non-aeronautical use or mixed use and the approval or consent will remain in effect for the duration of the lease term; the determination of whether the non-aeronautical use is significant will be based on the primary use of the project; FAA will only release Federal obligations when the airport sponsor proposes the sale or conveyance of federally acquired or federally conveyed airport land that meets FAA release requirements; and, FAA letters of approval or consent and releases will be documented on an airport’s Exhibit A in accordance with the ARP SOP 3.00 – *FAA Review of Exhibit ‘A’ Airport Property Inventory Maps*. This policy should be used in conjunction with FAA Order 5190.6, *Airport Compliance Manual*, Chapter 22, Releases from Federal Obligations; and FAA Order 5100.38, *Airport Improvement Handbook*; and any related policy implemented in conjunction and complementary

with Airports Planning and Programming (APP) guidance. Additionally, compliance specialists will consult with FAA Environmental Protection Specialists to determine what, if any, environmental obligations under relevant statutes or regulations may apply to specific land use changes at specific airports.

**DATES:** The FAA will accept public comments on the proposed policy statement for 30 days. Comments must be submitted on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The FAA will consider comments on the proposed policy statement. Any necessary or appropriate revisions resulting from the comments received will be adopted as of the date of a subsequent publication in the **Federal Register**.

**ADDRESSES:**

You may send comments [identified by Docket Number, FAA 2022-1203] using any of the following methods:

- *Government-wide Rulemaking Website:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.
- *Mail:* Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12- 140, Routing Symbol M-30, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Fax:* 1-202-493-2251.
- *Hand Delivery:* To Docket Operations, Room W12-140 on the ground floor of the West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:**

Lorraine Herson-Jones, Manager, Office of Airport Compliance and Management Analysis, ACO-100, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591, telephone (202) 267-3085.

**SUPPLEMENTARY INFORMATION:**

**Background**

*Airport Sponsor Obligations*

Congress authorized the conveyance of federal surplus property and financial assistance for the acquisition of land where the land is needed for “airport purposes.” See 49 U.S.C.

47107(c)(1). Under the Airport Improvement Act, “airport purpose” means land that “may be needed for an aeronautical purpose (including runway protection zone) or serves as noise buffer land.” *Id.* Federally conveyed or federally acquired land must be used for airport purposes until the FAA approves or consents to a non-aeronautical use and thereby discharges the sponsor of that obligation. 49 U.S.C. 47153(a), 49 U.S.C. 47125(a), and 49 U.S.C. 47107(c)(2)(B). In addition, Congress requires the FAA to submit an annual report listing airports not in compliance with airport land use restrictions and identifying necessary corrective action. 49 U.S.C. 47131(a)(5).

Airport sponsors that have accepted federally conveyed or federally acquired airport land have agreed to comply with certain obligations and policies included in the federal grant agreement or the federal conveyance documents regarding the use of the land. Those obligations derive from multiple statutes, deed covenants and the grant assurances.

Airport sponsors must request FAA written approval or consent to allow federally conveyed or federally acquired land to be used for non-aeronautical purposes. 49 U.S.C. 47153(a), 49 U.S.C. 47125(a), 49 U.S.C. 47107(c)(2)(B). The FAA’s authority to approve or consent to a non-aeronautical land use or to release obligations depends upon the obligating documents, the current and future aeronautical need of the property, and the proposed use. For example, residential use on airport property is incompatible with the needs of civil aviation, is prohibited by FAA policy, and is also contrary to federal obligations.

Limiting the use of aeronautical facilities to aeronautical purposes ensures that airport facilities are available to meet aviation demand at the airport. Aviation tenants and aircraft owners should not be displaced by non-aviation commercial uses that could be conducted off airport property.<sup>1</sup> The FAA must consider both the existing and future aviation demand. Over time, the definition of aeronautical use has remained relatively unchanged, except when changes were needed to reflect necessary access for sky diving, and new entrants, such as Unmanned Aircraft System (UAS) and commercial space. Aeronautical use accommodates an aeronautical activity. Aeronautical use lands receive additional benefits. They are afforded the protection of the grant assurances and may be charged favorable below market aeronautical rates. The aeronautical use definition protects the federal investment in aviation and ensures that non-aeronautical uses cannot easily displace aeronautical uses and thereby diminish the safety, efficiency and utility of the entire airport.

*Implications of FAA Reauthorization Act of 2018 (P.L. 115-254), Section 163*

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1. See *Policy on the Non-Aeronautical Use of Airport Hangars* (81 Fed. Reg. 38906-38907), June 15, 2016.

In addition, the “*FAA Reauthorization Act of 2018*” (P.L. 115-254), Section 163, changed the FAA’s authority to regulate non-federally acquired or conveyed airport land. The FAA’s authority over a proposed land use change may be limited when it does not impact safe and efficient operation of aircraft or safety of people and property on the ground related to aircraft operations or does not adversely affect the value of prior Federal investments to a significant extent. See P.L. 115-254 § 163(b)(1)(A) and (d)(1)(B). Section 163(a) limits the FAA’s authority to directly or indirectly regulate an airport owner or operator’s acquisition, use, lease, encumbrance, transfer, or disposal of land, any facility upon such land, or any portion of such land or facility. However, Section 163(b) contains three exceptions and provides the limitations on when Section 163(a) do not apply:

1. Any regulation ensuring the safe and efficient operation of aircraft or safety of people and property on the ground related to aircraft operations;<sup>2</sup>
2. Any regulation imposed with respect to land or a facility acquired or modified using Federal funding;<sup>3</sup>
3. Any authority contained in a Surplus Property Act instrument of transfer,<sup>4</sup> or Section 40117 of title 49 United States Code (Passenger Facility Charge statute).<sup>5</sup>

In cases covered by 163(b), FAA retains land use approval authority over the project. The FAA will follow this policy guidance and FAA Order 5190.6, *Airport Compliance Manual*.

When FAA lacks approval authority over a particular change in land use or sale of land, all of the airport sponsor’s federal statutory and grant assurance obligations remain in full force and effect, including over its remaining airport property. Airport sponsors remain obligated under the Grant Assurances, FAA’s *Policies and Procedures Concerning the Use of Airport Revenue* (64 Fed. Reg. 7696, February 16, 1999) (Revenue Use Policy), and FAA’s *Policy Regarding Rates and Charges* (78 Fed. Reg. 55330, September 10, 2013).

The sale or lease of the land must be accomplished per the FAA’s *Appraisal Standards for the Sale and Disposal of Federally Obligated Airport Property* (Compliance Guidance Letter 2018-3). The land must be sold or leased at fair market value and the funds must be used in

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2. See Section 163(b)(1)(A).

3. See Section 163(b)(2).

4. The FAA may retain approval authority over proposed changes in the use of lands granted to an airport sponsor from the United States, including under the *Surplus Property Act*, 49 U.S.C. 47125, section 16 of the *Federal Airport Act of 1946* Pub.L. 79– 377, section 23 of the *Airport and Airway Development Act of 1970*, Pub.L. 91–258, section 516 of the *Airport and Airway Development Act of 1982*, and former military airports conveyed to local public entities under the congressionally authorized Base Realignment and Closure program because lands granted under these statutes constitute federal investments in the airport.

5. See Section 163(b)(3).

accordance with the FAA's Revenue Use Policy. See 49 U.S.C. 47107(c)(2)(B). The sponsor should retain sufficient authority over the disposed land to prevent uses that conflict with its federal obligations and related requirements or create conditions resulting in violations of the assurances. To retain this authority, sponsors should consider using subordination clauses, reservations, covenants, or other restrictions in a deed or other instrument to protect the public's right to fly over the land, prohibit obstructions to air navigation or interference with the flight of aircraft, or assure compatible land use. The deed or other instrument containing the restrictions should be recorded in local land records.

The FAA may verify compliance with these requirements through a financial compliance review, review of supporting documentation, land use inspection, the enforcement of grant assurances, or other enforcement mechanisms. The sponsor also has the responsibility to comply with all federal, state, and local environmental laws and regulations.

## **Explanation of Terms**

**Aeronautical Use** - The FAA considers the aeronautical use of an airport to be any activity that involves, makes possible, is required for the safety of, or is otherwise directly related to, the operation of aircraft. Aeronautical use includes services provided by air carriers related directly and substantially to the movement of passengers, baggage, mail and cargo on the airport. *FAA's Policy Regarding Rates and Charges*, 78 Fed. Reg. 55330 (September 10, 2013).

Examples of aeronautical use include:

1. operational uses such as aerial approaches, nav aids, runways, taxiways, aprons, or other aircraft movement areas;
2. future developmental uses to reserve property interests for foreseeable aeronautical development (e.g., a planned runway extension or a planned terminal building development); and
3. essential services that directly support flight operations (e.g., aircraft maintenance, fueling, and servicing; mail, passenger and cargo processing facilities; communications and air traffic control; crash rescue, firefighting, and airport maintenance).

**Airport Purpose:** Uses of land that are directly related to the actual operation or the foreseeable aeronautical development of a public airport. These are situations where a primary aeronautical facility has some non-aeronautical components that support that facility's core aeronautical function within its operation. Examples of this are:

1. A terminal complex: All components of a terminal complex (including the building, terminal concessions, terminal parking, and roads) serve an airport purpose.

2. A fixed base operator (FBO) facility that includes parking and classrooms. All components serve an airport purpose.

An aeronautical facility serving an airport purpose does not include certain uses such as aircraft manufacturing plants and warehouse distribution facilities, which are considered as mixed-use as defined below.

**Non-Aeronautical Use:** All other uses that are not considered aeronautical. Non-aeronautical uses commonly occur on airports, but these uses do not have the priority or protection of the grant assurances. There is no federal requirement that obligated airport sponsors accommodate non-aeronautical uses. This differentiation between aeronautical and non-aeronautical is intended to protect the Federal investment in aviation and ensure that non-aeronautical uses cannot easily displace aeronautical uses and thereby diminish the safety, efficiency, and utility of the airport.<sup>6</sup>

Examples of these include:

1. Car rental facility (stand-alone). All components will be considered a non-aeronautical use.
2. Hotel and associated parking lot.
3. Warehouse and distribution center.

**Mixed Uses** – A mixed-use facility contains both aeronautical and non-aeronautical uses, but the non-aeronautical use is significant and could be located off airport property. Examples of mixed uses are:

1. Mail distribution centers that are connected to an air cargo operation.
2. Cargo operations containing non-aeronautical elements such as office building complexes, sorting facilities, long-term storage (warehousing), freight forwarders and third-party logistics providers, certain access infrastructure, or certain truck parking/trailer facilities (stalls). Most of these are related to other transportation modes or aspects of the cargo business, but not directly and substantially to its “aeronautical activity”.
3. Aircraft manufacturing facility that includes final assembly, but also significant non-aeronautical uses such as engineering facilities, research and development facilities, parts manufacturing and storage, employee parking, or office buildings.

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<sup>6</sup> FAA has provided guidance on the temporary non-aeronautical use of a hangar in FAA’s Hangar Use Policy, *Policy on the Non-Aeronautical Use of Airport Hangars*, 81 Fed. Reg. 38906, (June 15, 2016) ([www.govinfo.gov/content/pkg/FR-2016-06-15/pdf/2016-14133.pdf](http://www.govinfo.gov/content/pkg/FR-2016-06-15/pdf/2016-14133.pdf)).

**Federally acquired land** – This is land that was acquired with Federal funds, including the Airport Improvement Program (AIP), Bipartisan Infrastructure Law (BIL), Coronavirus Aid, Relief, and Economic Security (CARES) Act, Federal Aid to Airports Program (FAAP), Airport Development Aid Program (ADAP), and as part of an AP-4 agreement.<sup>7</sup> It also includes sponsor-acquired land that was used for the sponsor match on a federally funded project or was swapped for land purchased with federal funds.

**Federally conveyed land** – This is land conveyed to the sponsor by the Federal government through a written deed of conveyance (also called a patent) that contained specific restrictions or allowances for the use of the land. It includes land transferred under:

1. Surplus Property Act, codified in 49 U.S.C. 47151-47153, including former military airports conveyed to local public entities under 10 U.S.C. section 2687 of the Defense Base Closure and Realignment Act (BRAC) program or any other Federal laws; and,
2. Section 16 of the Federal Airport Act of 1946, 119 Pub.L. 79–377, Section 23 of the Airport and Airway Development Act of 1970, Pub.L. 91–258, and Section 516 of the Airport and Airway Development Act of 1982, codified in 49 U.S.C. 47125. These are sometimes referred to as non-surplus property transfers.

**Release of Federal obligations** – The formal, written authorization discharging and relinquishing all or part of the FAA’s right to enforce an airport’s contractual or deeded obligations. FAA’s authority to release, waive or amend an obligation is contained in 49 U.S.C. 47153(a) and 47107(h)(2).

**Letter of approval or consent** – FAA’s action on a proposed land use change may be documented in the form of a letter of approval or a letter of consent, depending upon the obligating deeds or documents and the land at issue.<sup>8</sup> The approval or consent should run concurrent with the lease term. At the end of the non-aeronautical lease term, the land reverts to the airport sponsor for aeronautical use.

## **Proposed Policy and Request for Comments**

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7. In some instances, an AP-4 Agreement included a Federal land purchase. The original agreement and funding should be reviewed to confirm the source of the funds.

<sup>8</sup> Surplus Property Act deeds often require the FAA’s written consent for a non-aeronautical use, so a letter of consent would be appropriate. Grant Assurance 5, *Preserving Rights and Powers*, requires prior written approval of the Secretary for the sell or transfer of any property upon which Federal funds have been expended, which would require a letter of approval. In both cases, the letters serve the equivalent purpose of documenting the FAA’s action on the sponsor’s request.

In accordance with the above, the FAA proposes to adopt the following policy statement on processing land use changes on federally acquired and federally conveyed land. The agency requests public comments on the proposed policy statement. Comments can be submitted as described in the “Address” and “Dates” information in this notice. Comments received by the due date will be considered in the development of a final agency policy statement.

### **The FAA’s Policy**

The FAA confirms and clarifies its prior policy and practice regarding the implementation of its statutory responsibility to review and approve or consent to, or deny, requests for land use changes on federally acquired or federally conveyed land<sup>9</sup>: (1) The FAA will review the sponsor’s proposal in its entirety without individually examining components of the proposal as aeronautical or non-aeronautical; (2) A letter of approval or consent is required for a non-aeronautical use or mixed use and the approval or consent will remain in effect only for duration of the lease term;<sup>10</sup> (3) the determination of whether the non-aeronautical use is significant will be based on the primary use of the project; (4) FAA will only release federal obligations when the airport sponsor proposes the sale or conveyance of federally acquired or federally conveyed airport land that meets FAA release requirements;<sup>11</sup> and (5) FAA letters of approval or consent and releases will be documented on the Exhibit A in accordance with ARP SOP 3.00 – *FAA Review of Exhibit ‘A’ Airport Property Inventory Maps*. FAA Order 5190.6, *Airport Compliance Manual*, will be updated to reflect this policy guidance.

#### *Process for Evaluating Land Use Changes*

Uses of airport land will fall into one of four categories: (1) Aeronautical use, (2) Airport Purpose, (3) Non-Aeronautical Use, or (4) Mixed-Use.

FAA must approve or consent to all non-aeronautical and mixed uses of federally acquired and federally conveyed land. If the FAA determines that the proposed use serves an aeronautical use or airport purpose as defined above, then FAA approval or consent is not required. The following explains the process when an airport sponsor requests a change in land use on federally conveyed or federally acquired land:

#### *1. What Sponsors must submit*

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9. This will also apply in situations where a land use change impacts the safe and efficient operation of aircraft or safety of people and property on the ground related to aircraft operations.

10. This process will supersede the existing interim and concurrent use process that was limited to 3-5 years; FAA Order 5190.6, Chapter 22 will be updated to reflect this revised process.

11 Sponsors should follow the existing release process in 14 CFR Part 155, *Release of Airport Property from Surplus Property Disposal Restrictions* and FAA Order 5190.6, Chapter 22.



The sponsor's request needs to include the following:

- a. documentation on how the land was acquired (i.e., federal conveyance documents, Federal grant agreements, Exhibit A, etc.);
- b. current and future aeronautical demand of the airport and the land; and
- c. proposed non-aeronautical use, including the length of the lease.

## *2. FAA's Evaluation of the Request*

FAA's determination of whether the non-aeronautical use is significant, consistent with the term "mixed uses" in "Explanation of Terms" in this document, will be made based on **the primary use of the project**. The process involves a certain level of discretion by the FAA and the airport sponsor. Major considerations in granting approval or consent include:

- a. reasonableness and practicality of the sponsor's request,
- b. effect of the request on needed aeronautical facilities, and
- c. compatibility of the proposal with the needs of civil aviation. (**NOTE:** The residential use of airport property is incompatible with the needs of civil aviation, is prohibited by FAA policy, and is also contrary to Federal obligations.)

The distinctions may vary slightly depending on the circumstances of the situation, such as intermodal functionality, proponent's business model, project integrity, available airport land, project size and location, airport planning priorities, and funding requirements and restrictions. The proposal must benefit the airport and its functions in support of aeronautical uses and not adversely affect the value of the Federal investment in the airport and its facilities. 49 U.S.C. 47107(a)(16)(B), 49 U.S.C. 47125(a), and 49 U.S.C. 47152(1).

The use should be compatible with the airport's current or future aeronautical use or demand. FAA approval shall not be granted if the FAA determines that an aeronautical demand for the land is likely to exist within the period of the proposed use, or it compromises the safety and operation of the airport. FAA consent to or approval of a non-aeronautical use should only extend for duration of the lease term and must provide that the land will be returned to aeronautical use at the end of the term.

## *3. Documentation of FAA Decision*

Upon completion of the review, the FAA will either issue a letter of approval or letter of consent for the non-aeronautical use or mixed-use, or deny the request.

The letter of approval or letter of consent must document the FAA's approval of a non-aeronautical land use on federally acquired or federally conveyed airport land. This letter will outline the conditions of the approval or consent and include a requirement that the land must be available for aeronautical use at the end of the approval or consent period. Generally, the

approval or consent will remain for the duration of the lease agreement. The letter of approval or letter of consent does not affect or negate the sponsor's federal obligations.

The requirement for NEPA should be coordinated with FAA Environmental Protection Specialists.

All land use changes should be shown on the Exhibit A in accordance with ARP SOP 3.00 – *FAA Review of Exhibit 'A' Airport Property Inventory Maps*. This includes depicting in a table format the type of use for a facility, (e.g.: aeronautical, non-aeronautical, mixed-use), and the approval and expiration dates.

Issued in Washington, DC, on September 7, 2022.

Kevin C. Willis,  
*Director, Office of Airport Compliance and Management Analysis.*

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